Parasuraman a/l Kuppan v Sazali bin Md Akhir & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO K–04–39 OF 1997

SHAIK DAUD, ABDUL MALEK AHMAD AND HAIDAR JJCA

10 JULY 1999

Civil Procedure *— Discovery — Notice to produce — Whether respondent's application is in prescribed form — Whether application necessary as dispute has been clarified by appellate court — Rules of the High Court 1980 O 24 r 10(1)*

Civil Procedure *— Judgments and orders — Clarification of order — Whether proper procedure followed — Rules of High Court 1980 O 42 r 8(3) & (4)*

The appellant was the second plaintiff in the Sessions Court at Jitra. He had successfully sued the respondents as defendants in the sessions court for damages in a running-down case. The learned sessions court judge granted an award of RM25,000 for general damages, RM720 for special damages and costs of RM4,797.60. Being dissatisfied with the award, the appellant appealed to the High Court. In the High Court, Mohamed Noor Abdullah JC (as he then was) allowed the appeal. The respondents filed an appeal against the judgment of the High Court vide Supreme Court Civil Appeal No 04–32–93 ('the appeal'). Pending the determination of the appeal by the Supreme Court, the respondents filed an application for stay of execution of the High Court judgment (encl 40). The application was heard by Hishamudin Yunus J, on 3 December 1994 and it was allowed. The disputed amount of RM46,707.66 was to be sent direct to Tetuan Francis Nathar & Co, solicitors for the appellant and to be held as stakeholders. The question the respondents intended to refer to the Supreme Court was whether the appellant was entitled to get pre-trial loss and loss of earning capacity. It was held that the appellant was not entitled to the said claims. Encik Visvanathan, as counsel for the respondents when drawing up the draft order of the Federal Court, had framed the order in general terms. When he sent his draft order to En Francis Nathar, counsel for the appellant, En Francis Nathar did not agree with his draft order and prepared his own draft order as he perceived of what was decided and sent it to En Visvanathan. Encik Visvanathan sent his draft order as well as En Francis Nathar's draft order to the Registrar of the Federal Court for approval. The registrar approved the draft order submitted by En Visvanathan and therein lies the root of the problem.

The sealed copy of the Federal Court order ('the first order') dated 11 July 1995 was served on En Francis Nathar by En Visvanathan demanding for the refund of RM48,316.47 on the basis that the respondents were successful in setting aside the judgment of the High Court. Encik Francis Nathar responded vide letter dated 20 September 1995 that his client was only entitled to a

refund of RM14,240 (being RM5,000 for loss of earning capacity and RM9,240 being loss of pre trial income) and interest of 4% per annum. On the refusal of Tetuan Francis Nathar & Co to comply with the order of the Federal Court, En Visvanathan proceeded to file a summons-in-chambers dated 28 January 1996 (encl 57) in the High Court. He had also filed a notice to produce (encl 72) requesting further information regarding the accounts purportedly made pursuant to O 24 r 12 of the Rules of the High Court 1980 ('the RHC'). By 15 January 1997 when the learned judge was to deliver the judgment on encl 72, he was informed by En Francis Nathar that a notice of motion was disposed of by the Federal Court on 21 November 1996 and the Federal Court confirmed the terms of its judgment of 11 July 1995 and they were as interpreted by him. The learned judge made orders pursuant to encl 72 and the ancillary order of referring En Francis Nathar to the disciplinary board under the Legal Profession Act 1976 ('the LPA') for his misconduct in releasing a sum of money to his client and hence the appeal.

Held, allowing the appeal:

(1) Order 24 r 12 of RHC does not refer to a notice to produce as En Visvanathan purportedly tried to invoke. The prescribed form for the notice to produce is Form 43 which is under O 24 r 10(1). Therefore, encl 72 is not the prescribed form. Order 24 of RHC also refers to matters begin by writ (see O 24 r 1). The present matter is an appeal and not a writ action. Hence, O 24 is irrelevant and misplaced for En Visvanathan to invoke. Further, at the time of making the order, the learned judge was aware of the amended order of the Federal Court which made it abundantly clear as to the terms in which the appeal was allowed.There was no necessity for the learned judge to make the order in terms of encl 72 and it should have been dismissed forthwith (see p 123I–124B, E–F).

(2) As to the ancilliary order of the learned judge in referring En Francis Nathar to the disciplinary board for misconduct, it is more of the interpretation of the first order of the Federal Court which by the amended order of the Federal Court had vindicated him. Hence, En Francis Nathar was not wrong to release the money after the first order of the Federal Court as to what he honestly believed to be the terms of the judgment of the Federal Court and which was confirmed by the amended order. Encik Francis Nathar had not breached the order of the High Court dated 3 December 1994 or the first order of the Federal Court (which was subsequently amended) to warrant an action to be taken for misconduct against him under the LPA (see p 124F–H).

Obiter:

Counsel for both parties should have sought an appointment with the judge (in this case the presiding judge) for the dispute in respect of the

draft order to be determined. Counsel for the respondent should have taken the initiative as it was he who first prepared the draft order knowing fully well of the disagreement as to the terms of his draft order when En Francis Nathar sent his own draft order to him. It was not for the registrar to resolve the dispute in their absence (see O 42 r 8(3) and (4) of RHC) (see p 120F–G).

[Bahasa Malaysia summary

Perayu adalah plaintif kedua di dalam Mahkamah Sesyen di Jitra. Beliau telah berjaya mendakwa responden-responden sebagai defendan-defendan di mahkamah sesyen untuk ganti rugi dalam suatu kes pelanggaran. Hakim mahkamah sesyen yang arif membenarkan suatu award sebanyak RM25,000 sebagai ganti rugi am, RM720 sebagai ganti rugi khas dan kos sebanyak RM4,797.60. Disebabkan tidak puas hati dengan award tersebut, perayu telah merayu kepada Mahkamah Tinggi. Di Mahkamah Tinggi, Mohamed Noor Abdullah JC (pada masa itu) telah membenarkan rayuan tersebut. Responden-responden memfailkan suatu rayuan terhadap keputusan Mahkamah Tinggi melalui Rayuan Sivil Mahkamah Agung No 04-32-93 ('rayuan tersebut'). Sementara menunggu keputusan rayuan tersebut oleh Mahkamah Agung, responden-responden telah memfailkan suatu permohonan untuk penggantungan pelaksanaan keputusan Mahkamah Tinggi tersebut (kand 40). Permohonan tersebut didengar oleh Hishamudin Yunus J, pada 30 Disember 1994 dan ia telah dibenarkan. Jumlah yang dipertikaikan iaitu RM46,707.66 adalah dikehendaki dihantar terus kepada Tetuan Francis Nathar & Co, peguambela kepada perayu yang dianggap sebagai pemegang amanah harta. Persoalan yang mana responden-responden berhasrat untuk merujuk kepada Mahkamah Agung adalah sama ada perayu berhak memperolehi kerugian praperbicaraan dan kehilangan kapasiti mendapatkan pendapatan. Adalah diputuskan bahawa perayu adalah tidak berhak kepada tuntutan-tuntutan tersebut. Encik Visvanathan, sebagai peguambela kepada responden-responden apabila membuat deraf perintah Mahkamah Persekutuan, telah membuat perintah tersebut dalam terma-terma yang am. Apabila beliau menghantar deraf perintah beliau kepada En Francis Nathar, peguambela kepada perayu, En Francis Nathar tidak bersetuju dengan deraf perintahnya dan menyediakan deraf perintah beliau sendiri sebagai mana beliau beranggapan telah diputuskan dan menghantarnya kepada En Visvanathan. Encik Visvanathan menghantar deraf perintah beliau dan juga deraf perintah En Francis Nathar kepada Pendaftar Mahkamah Persekutuan untuk kelulusan. Pendaftar telah meluluskan deraf perintah yang diserahkan oleh En Visvanathan dan di situ letaknya punca masalah.

Salinan bermeterai perintah Mahkamah Persekutuan ('perintah pertama tersebut') bertarikh 11 Julai 1995 telah disampaikan kepada En Francis Nathar oleh En Visvanathan yang menuntut untuk bayaran balik RM48,316.47 atas dasar bahawa responden-responden

berjaya di dalam mengketepikan penghakiman Mahkamah Tinggi. Encik Francis Nathar membalas melalui surat bertarikh 20 September 1995 bahawa anak guam beliau hanya berhak kepada bayaran balik sebanyak RM14,240 (yang merupakan RM5,000 sebagai kehilangan kapasiti bekerja dan RM9,240 sebagai kerugian pendapatan pra-perbicaraan) dan faedah pada 4% setahun. Di atas keengganan Tetuan Francis Nathar & Co untuk mematuhi perintah Mahkamah Persekutuan, En Visvanathan meneruskan dengan memfail saman dalam kamar bertarikh 28 Januari 1996 (kand 57) di Mahkamah Tinggi. Beliau juga memfailkan notis untuk mengemukakan (kand 72) memohon untuk maklumat lanjutan berkenaan dengan akaun-akaun yang dibuat menurut A 24 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Menjelang 15 Januari 1997 apabila hakim yang arif ditetapkan untuk memberi penghakiman berkenaan dengan kand 72, beliau telah diberitahu oleh En Francis Nathar bahawa suatu notis usul telah didengar oleh Mahkamah Persekutuan pada 21 November 1996 dan Mahkamah Persekutuan telah mengesahkan terma-terma penghakiman mahkamah pada 11 Julai 1995 dan ia adalah seperti yang ditafsirkan oleh beliau. Hakim yang arif membuat perintah-perintah menurut kand 72 dan perintah sampingan untuk merujuk En Francis Nathar kepada lembaga tatatertib di bawah Akta Profesyen Undang-Undang 1976 ('LPA') berkenaan dengan salah laku dalam mengeluarkan sejumlah wang kepada anak guam beliau dan maka rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Aturan 24 k 12 KMT tidak merujuk kepada notis untuk mengemukakan sebagai mana En Visvanathan cuba untuk bangkitkan. Borang yang telah ditetapkan untuk notis untuk mengemukakan adalah Borang 43 yang adalah di bawah A 24 k 10(1). Maka demikian, kand 72 bukan borang yang telah ditetapkan. Aturan 24 KMT juga merujuk kepada perkara-perkara yang dimulakan melalui writ (lihat A 24 k 1). Perkara ini adalah suatu rayuan dan maka bukan suatu tindakan writ. Maka, A 24 adalah tidak relevan dan adalah salah untuk En Visvanathan untuk memakainya. Tambahan, pada masa membuat perintah tersebut, hakim yang arif sedar akan perintah yang telah dipinda oleh Mahkamah Persekutuan yang telah membuat dengan amat jelasnya akan terma-terma dalam mana rayuan tersebut dibenarkan. Tiada keperluan untuk hakim yang arif untuk membuat perintah seperti yang dipohon di dalam kand 72 dan ia seharusnya ditolak dengan serta-merta (lihat ms 123I–124B, E–F).

(2) Berkenaan dengan perintah sampingan hakim yang arif di dalam merujuk En Francis Nathar kepada lembaga tatatertib untuk salah laku, ia adalah lebih kepada tafsiran perintah pertama tersebut oleh Mahkamah Persekutuan yang mana perintah Mahkamah Persekutuan yang dipinda tersebut telah menyangkal tuduhan terhadap beliau. Maka, En Francis Nathar adalah tidak

silap di dalam membenarkan wang tersebut dikeluarkan selepas perintah pertama tersebut oleh Mahkamah Persekutuan sebagai mana yang beliau dengan sesungguhnya percaya adalah merupakan terma-terma penghakiman Mahkamah Persekutuan dan yang mana telah disahkan oelh perintah yang dipinda tersebut. Encik Francis Nathar tidak melanggar perintah Mahkamah Tinggi bertarikh 3 Disember 1994 atau perintah pertama tersebut oleh Mahkamah Persekutuan (yang dipinda kemudiannya) yang mewajarkan suatu tindakan diambil untuk salah laku terhadap beliau di bawah LPA (lihat ms 124F–H).

Obiter:

Peguambela-peguambela untuk kedua-dua pihak seharusnya memohon temujanji dengan hakim (di dalam kes ini hakim yang bersidang) untuk pertikaian berkenaan dengan deraf perintah untuk diputuskan. Peguambela untuk responden seharusnya mengambil inisiatif memandangkan bahawa beliau yang mula-mula membuat deraf perintah tersebut mengetahui sepenuhnya akan percanggahan pendapat berkenaan dengan terma-terma deraf perintah beliau apabila En Francis Nathar menghantar deraf perintah beliau kepadanya. Bukan untuk pendaftar untuk menyelesaikan pertikaian tanpa kehadiran mereka (lihat A 42 k 8(3) dan (4) KMT) (lihat ms 120F–G).]

Notes

For cases on discovery, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1569–1605.

For cases on judgment and orders, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2724–2805.

Legislation referred to

Legal Profession Act 1976 s 94(3)(b)

Rules of the High Court 1980 O 24 rr 1, 10(1), 12, O 42 rr 8(3), (4)

Appeal from: Civil Appeal No 12–43–1991 (encl 57 and 72) (High Court, Alor Setar)

MS Murthi (*Mayandi E* with him) (*Mayandi & Panjaram*) for the appellant.

S Visvanathan (*Syarikat Visva*) for the respondent.

Haidar JCA (delivering judgment of the court): This is an appeal by Parasuraman a/l Kuppan (appellant) against the decision of the Alor Setar High Court on 4 May 1997 whereby pursuant to an application by Sazali bin Mohd Akhir and Ismail bin Mat Senawi (respondents) by way of a notice to produce (encl 72), the learned judge ordered (p 37 of the appeal record):

(i) that subject to (ii) below, the request for documents under items (1), (2), (3), (6), (7) and (8) be allowed; and

(ii) that only the documents/statements on the deposit and interest earned until the date of withdrawal for purposes of paying into court be produced.

The application is purportedly made pursuant to O 24 r 12 of the Rules of the High Court 1980 ('the RHC').

In addition thereto, for the purpose of O 42 r 6(1) of RHC the learned judge on 6 July 1997 ordered the solicitors for the appellant to comply with the order of court of 4 May 1997 in respect of the notice to produce (encl 72) within thirty days of the service of the said order.

On the oral complaint of counsel for the respondents, the learned judge also found that the act of En Francis Nathar, counsel/solicitor for the appellant, amounted to misconduct within the meaning of s 94(3)(b) of the Legal Profession Act 1976 ('the LPA') and thereby directed his deputy registrar to serve a copy of his judgment and do pursuant to s 99(2) of the LPA refer En Francis Nathar to the Disciplinary Board set up under the LPA.

Before considering the issue before us, it would be useful to set out the background facts that led to the orders made by the learned judge.

Background facts

The appellant was the second plaintiff in the sessions court at Jitra. He had successfully sued the respondents as defendants in the sessions court for damages in a running-down case. The learned sessions court judge granted an award of RM25,000 for general damages, RM720 for special damages and costs of RM4,797.60. Being dissatisfied with the award, the appellant appealed to the High Court.

In the High Court, Mohamed Noor Abdullah JC (as he then was) allowed the appeal and gave the following awards to the appellant:

(a) RM33,000 for general damages.

(b) RM6,000 for hip dislocation.

(c) RM8,000 for corrective surgery.

(d) RM5,000 for loss of earning capacity.

(e) RM9,240 for pre trial loss of income.

The respondents in turn, through their solicitors, Tetuan Syarikat Visva filed an appeal against the judgment of the High Court vide Supreme Court Civil Appeal No 04-32-93.

Pending the determination of Civil Appeal No 04–32–93 by the Supreme Court (subsequently known as the Federal Court), the respondents filed an application for stay of execution of the High Court judgment (encl 40). The application was heard by Hishamudin J Yunus J, on 3 December 1994 and it was allowed, subject to the following conditions:

A (i) that the total sum due under the High Court judgment be paid to Tetuan Francis Nathar & Co, solicitors for the appellant;

(ii) that Tetuan Francis Nathar & Co, be allowed to disburse to the appellant, the sum due to the appellant under the sessions court judgment;

B (iii) that the balance, after disbursement to the appellant under (ii), be held by Tetuan Francis Nathar & Co, as stakeholders until the final disposal of Civil Appeal No 04–32–93; and

(iv) pending the disposal of Civil Appeal No 04–32–93, this sum of money (disputed amount) was to be kept in a fixed deposit account as part of the client's account to be disbursed together with the interest earned C to whichever party the Supreme Court declares to be entitled.

The disputed amount of RM46,707.66 was sent direct to Tetuan Francis Nathar & Co, solicitors for the appellant, by South East Asia Insurance Berhad, the insurance company which had to indemnify the respondents on 20 April 1995 (p 184 of the appeal record).

D

The issue in this appeal really is centred on the result of Civil Appeal No 04-32-93 in the Federal Court vis-a-vis condition (iv) imposed by the learned judge. We therefore need to examine the order made by the Federal Court and the subsequent amended order made by the Federal Court.

E *Supreme Court Civil Appeal No 04–32–93*

Both counsel before us were also the counsel before the Federal Court when the Federal Court determined the appeal on 11 July 1995.

We note that at the time of the ex parte application for leave to appeal to the Supreme Court by the respondents before Mohamed Noor F Abdullah JC (as he then was) it is clear that the question the respondents intended to refer to the Supreme Court was whether the appellant was entitled to get pre-trial loss and loss of earning capacity (see p 248 of the appeal record). From the notes of the proceedings before the Federal Court on 11 July 1995, this question was confirmed by the Federal Court, that is, 'only leave to appeal on pre-trial loss and loss of earning capacity' (see p 251 G of the appeal record). In other words, the issue or question before the Federal Court was whether the High Court was right in allowing the said claims or the sessions court was right in rejecting the said claims? The Federal Court ruled that the appellant was not entitled to the said claims and hence allowed the appeal of the respondents as appellants before the H Federal Court and affirmed the judgment of the sessions court that rejected the said claims. Encik Visvanathan, counsel/solicitor for the respondents, in the circumstances could not possibly argue that the issue or question before the Federal Court was not confined only to pre-trial loss and loss of earning capacity. It was in that context that the respondents as appellants were successful in their appeal in the Federal Court.

I

However, En Visvanathan, as counsel/solicitor for the respondents as appellants when drawing up the draft order of the Federal Court, framed the order, we would say, in general terms. When he sent his draft order to

En Francis Nathar, counsel/solicitor for the appellant (respondent in the Federal Court) for approval, quite naturally En Francis Nathar did not agree with his draft order and prepared his own draft order as he perceived of what was decided by the Federal Court and sent it to En Visvanathan. Being aware of the disagreement to the terms of his draft order, instead of applying for an appointment to the Registrar of the Federal Court, as required by the rules of procedure, what En Visvanathan did was merely to send his draft order as well as En Francis Nathar's draft order to the Registrar of the Federal Court for approval. What En Visvanathan did was definitely wrong in view of r 3 of the Rules of the Federal Court 1995 and O 42 r 8(3) and (4) of RHC.

Rule 3 reads:

> Application of the Rules of the High Court 1980, etc
>
> Where no other provision is made by any written law or by the Rules, the procedure and practice in the Rules of the Court of Appeal 1994 and the Rules of the High Court 1980 shall apply mutatis mutandis.

Rule 8(3) and (4) of O 42 read:

> (1) ...
>
> (2) ...
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> (3) In any case where the solicitors concerned are unable to agree upon the draft, any one of them may obtain an appointment before the Registrar, of which notice shall be given to the other, to settle the terms of the judgment or order.
>
> (4) Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a Judge, any party may require the matter in dispute to be referred to the Judge for his determination.
>
> (5) ...

Either En Visvanathan or En Francis Nathar should have sought an appointment with the judge (in this case the presiding judge) for the dispute to be determined. In this case we are of the view that En Visvanathan should have taken the initiative as it was he who first prepared the draft order knowing fully well of the disagreement as to the terms of his draft order when En Francis Nathar sent his own draft order to him. It was not for the registrar to resolve the dispute in their absence. Unfortunately the problem was compounded by the registrar taking upon herself to approve the draft order submitted by En Visvanathan and therein lies the root of the problem. We must say here that had counsel complied with the rules pertaining to the terms of the draft order in dispute much of judicial time would not have been wasted in sorting the terms of the order of the Federal Court and the present appeal would thus have been unnecessary.

The sealed copy of the Federal Court order dated 11 July 1995 ('first order') was served on En Francis Nathar by En Visvanathan vide letter dated 17 September 1995 demanding for the refund of RM48,316.47 on the basis that the respondents were successful in setting aside the judgment of the High Court (see p 218 of the appeal record). Encik Francis Nathar responded vide letter dated 20 September 1995 that his client was only

entitled to a refund of RM14,240 and interest of 4% per annum (being (RM5,000 for loss of earning capacity and RM9,240 being loss of pre trial income). En Francis Nathar further stated 'We are rather bemused by your blunt request to us to forward the sum of RM48,316.47 without any deduction whatsoever (despite the order of court) and without any reference or explanation as to whether or how your client is going to pay to us the sum of general damages plus interest awarded by the High Court and which award was upheld by the Supreme Court' (p 224 of the appeal record).

The first order of the Federal Court reads:

> Rayuan ini ditetapkan untuk perbicaraan pada hari ini dalam kehadiran En S Visvanathan, peguam bagi pihak perayu-perayu dan En Francis Nathar, peguam bagi responden yang dinamakan di atas dan setelah membaca rekod rayuan dan rekod rayuan tambahan responden yang dinamakan di atas dan setelah membaca rekod rayuan dan rekod rayuan tambahan yang telah difailkan dan setelah mendengar peguam-peguam tersebut maka pada hari ini diperintahkan bahawa rayuan ini dibenarkan dan selanjutnya diperintahkan bahawa tiap-tiap pihak menanggung kos sendiri dalam rayuan ini sahaja, dan selanjutnya diperintahkan bahawa perintah mahkamah yang telah dihakimi di Mahkamah Tinggi Alor Setar dalam rayuan sivil No 12-43-91 pada 21 Oktober, 1993 diketepikan; dan akhirnya diperintahkan bahawa wang sebanyak RM500 yang dibayar ke dalam mahkamah sebagai jaminan kos rayuan ini dikembalikan kepada perayu-perayu.

On the refusal of Tetuan Francis Nathar & Co to comply with the first order of the Federal Court as perceived by En Visvanathan and disagreed to by En Francis Nathar. Encik Visvanathan proceeded to file a summons-in-chambers dated 28 January 1996 (encl 57) in the High Court.

Summons-in-chambers dated 28 January 1996 (encl 57)

The material prayers of encl 57 are:

> (1) ...
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> (2) Peguam perayu Tetuan Francis Nathar & Co mematuhi perintah mahkamah bertarikh 3 Disember 1994 dan mengembalikan wang sebanyak RM46,707.66 termasuk faedah yang telah didepositkan dalam akaun tetap dalam akaun pelanggan Tetuan Francis Nathar & Co kepada Tetuan Syarikat Visva, peguam responden-responden.
>
> (3) Peguam perayu, Tetuan Francis Nathar & Co, kemukakan kepada timbalan pendaftar mahkamah ini dan Tetuan Syarikat Visva akaun pelanggan mengenai wang RM46,707.66 yang telah dikirimkan kepadanya pada 15 April 1995 serta faedah atas itu hingga penyelesaian perintah permohonan ini.

When encl 57 came for hearing on 20 March 1996, before the learned judge, En Francis Nathar in dealing with prayer (2) explained why he refused to refund the full amount to Syarikat Visva. Encik Francis Nathar contended that En Visvanathan misinterpreted the first order of the Federal Court and that only the other awards, that is, on loss of earning capacity and pre-trial loss were set aside by the Federal Court. He further intimated to the learned judge that in order to ascertain the true intent of the first order

of the Federal Court, he had filed a notice of motion at the Federal Court and it was scheduled for hearing on 1 April 1996. He therefore prayed for an adjournment of the hearing of encl 57.

The learned judge allowed the adjournment in respect of prayer (2) only to a date after the hearing of the notice of motion by the Federal Court. The learned judge directed the parties to submit in respect of prayer (3) and after hearing the parties, he made the following order:

> Atas permohonan responden-responden yang dinamakan di atas melalui saman dalam kamar (lampiran 57) bertarikh 28 Januari, 1996 dalam kehadiran En Francis Nathar, peguam bagi pihak perayu dan En S Visvananthan, peguam bagi pihak responden-responden dan setelah membaca afidavit En S Visvanathan (lampiran 58) yang diikrarkan pada 25 Januari 1996 dan setelah mendengar peguam-peguam tersebut maka pada hari ini adalah diperintahkan bahawa peguam perayu Tetuan Francis Nathar & Co, kemukakan kepada Timbalan Pendaftar Mahkamah ini dan Tetuan Syarikat Visva pada atau sebelum 27 Mac 1996 mengfail satu afidavit yang kemukakan penyata akaun pelanggan mengenai RM46,707.66 yang telah dikirimkan kepadanya pada 15. April 1995 serta faedah atas itu dan selanjutnya diperintahkan bahawa permohonan ini mengenai lain-lain hal ditangguhkan untuk sambung bicara pada 14 Mei 1996.

En Francis Nathar complied with this order of the learned judge on 27 March 1996 by filing an affidavit sworn on 26 March 1996 with the statement of his clients' account (encl 64). The affidavit is set out in the judgment of the learned judge of pp 30 to 31 of the appeal record. We need not reproduce it here.

When the parties appeared before the learned judge for submissions in respect of the second prayer of encl 57 on 2 July 1996, En Francis Nathar sought an adjournment for him to file a further affidavit to exhibit the notice and memorandum of appeal filed by the respondents as appellants to the Federal Court and the order of the sessions court, the reason of which we are not clear. It was this juncture that En Visvanathan brought to the attention of the learned judge that encl 64 disclosed that En Francis Nathar had released a sum of RM30,934.64 on 21 September 1995 to his client in spite of the order of the High Court as well as the first order of the Federal Court. Encik Visvanathan then urged the learned judge to issue an interim order for the preservation of RM47,587.15 pending the disposal of encl 57 if the learned judge was minded to grant an adjournment. At the same time En Visvanathan informed the learned judge that after receipt of encl 64, he had filed a notice to produce (encl 72) requesting further information regarding the accounts.

The learned judge allowed the adjournment on condition that pending the disposal of encl 57, M/s Francis Nathar & Co, was to deposit into the court within 7 days, the sum of RM47,587.15. Messrs Francis Nathar complied with this order on 9 July 1996. On 15 August 1996, this interim order was by consent made final pending the disposal of the motion by the Federal Court.

By the time the parties appeared before the learned judge on 15 September 1996, En Francis Nathar submitted that the prayers in

encl 57 had been complied with by him and there was nothing to adjudicate. If En Visvanathan felt that the affidavit by En Francis Nathar (encl 64) was insufficient compliance with the order of the learned judge what he needed to do was simply to urge the learned judge to order En Francis Nathar to file a further affidavit enclosing the required documents. This he did not do but instead chose to file notice to produce purportedly under O 24 r 12 of RHC (encl 72).

Enclosure 72

The parties took time to complete their submissions on encl 72. By 15 January 1997 when the learned judge was to deliver the judgment, he was informed by En Francis Nathar that the notice of motion was disposed of by the Federal Court on 21 November 1996 and the Federal Court confirmed the terms of its judgment of 11 July 1995 and they were as interpreted by him. The amended order of the Federal Court dated 21 November 1996 reads:

> Rayuan ini ditetapkan untuk perbicaraan pada hari ini dalam kehadiran En S Visvanathan, peguam bagi pihak perayu-perayu dan En Francis Nathar, peguam bagi responden yang dinamakan di atas dan setelah membaca rekod rayuan dan rekod rayuan tambahan yang telah difailkan dan setelah mendengar peguam-peguam tersebut maka pada hari ini diperintahkan bahawa rayuan terhadap award bgi kerugian pendapatan dan kehilangan keupayaan pendapatan dibenarkan dan perintah Mahkamah Tinggi Alor Setar bertarikh 21 Oktober 1994 diketepikan bagi maksud setakat itu sahaja dan selanjutnya diperintahkan bahawa tiap-tiap pihak menanggung kos sendiri dalam rayuan ini sahaja.

In our view, the amended order settled the issue of the terms of the first order and that would be the end of the matter. The South East Asia Insurance Berhad could get back its money together with whatever interest accrued from the money deposited into the court by M/s Francis Nathar & Co, that is ,RM5,000 for loss of earning capacity and RM9,240 for the pre-trial loss of income and the balance be refunded to Tetuan Francis Nathar & Co. In the circumstances, En Francis Nathar submitted that encl 72 ought to be dismissed, the orders made under encl 57 be set aside and En Visvanathan be personally made liable for all costs incurred as in encl 57. However, the learned judge held that in view of the amended order of the Federal Court and in the interest of justice he invited further submissions from the parties on encl 72. On 4 May 1997, the learned judge made the orders that were the subject of the appeal before us.

The issue is whether the learned judge was right to make the orders pursuant to encl 72 and the ancillary order of referring En Francis Nathar to the disciplinary board under the LPA for misconduct.

For a start we must reiterate that the learned judge at the time he heard the arguments on encl 72 was well appraised of the amended order of the Federal Court and that would be the end of the matter. Be that as may, was En Visvanathan correct to proceed with encl 72 under O 24 r 12 of RHC?

Order 24 r 12 of RHC does not refer to notice to produce as En Visvanathan purportedly tried to invoke. The prescribed form for the

notice to produce is Form 43 which is under O 24 r 10(1). Therefore encl 72 is not the prescribed form. Order 24 r 10(1) reads:

> Any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.

However, O 24 of RHC refers to matters begin by writ (see O 24 r 1). The present matter is an appeal and is not a writ action. Hence, O 24 is irrelevant and misplaced for En Visvanathan to invoke. Before us, En Visvanathan conceded that he was wrong in proceeding by way of encl 72 but contended that the court has inherent jurisdiction to hear it. With respect, we disagreed. Why should the court invoke its inherent jurisdiction in favour of a party whose counsel/solicitor wrongly invoked the procedure and which procedure entailed undue hardship to the opposite party? This issue was raised by En Francis Nathar before the learned judge but it was unfortunate that the learned judge did not give due consideration to this substantial procedural issue (see p 88 of the appeal record).

On this ground alone, the learned judge should have dismissed encl 72 and there was no necessity to make a further order pursuant to O 42 r 6(1) that the solicitors for the appellant do comply with the order of the court in respect of encl 72 within 30 days of the service of the said order. As stated earlier on, it would suffice for En Visvanathan to get an order from the learned judge for En Francis Nathar to file a further affidavit enclosing whatever documents sought by him.

As stated earlier, at the time of making the order in respect of encl 72, the learned judge was aware of the amended order of the Federal Court which made it abundantly clear as to the terms in which the appeal was allowed and further, encl 52 was duly complied with pending the motion before the Federal Court, and there was therefore no necessity for the learned judge to make the order in terms of encl 72 and it should have been dismissed forthwith.

As to the ancilliary order of the learned judge in referring En Francis Nathar to the disciplinary board for misconduct, it is more of the interpretation of the first order of the Federal Court which by the amended order of the Federal Court had vindicated him. Hence, En Francis Nathar was not wrong to release the money after the first order of the Federal Court as to what he honestly believed to be the terms of the judgment of the Federal Court and which was confirmed by the amended order. It seemed clear to us that En Francis Nathar had not breached the order of the High Court dated 3 December 1994 or the first order of the Federal Court (which was subsequently amended) to warrant for action to be taken for misconduct against him under the LPA. It is not a matter of En Francis Nathar questioning the validity of the order or to put it any other way, blatantly breaching the High Court order or the first order of the Federal Court. In our respectful view he should not be faulted and the person who should be pulled up should be En Visvanathan who fully knew of the terms of the judgment of the Federal Court for the reasons stated by us earlier. He

chose to put up the draft order in general terms so as to benefit the respondents/South East Asia Insurance Bhd, an act which may amount to misleading the court.

For the reasons stated, we allowed the appeal with costs here as well as in the court below. The orders of the learned judge were set aside and the deposit ordered to be refunded.

Appeal allowed.

Reported by Benjamin Yong